No. 89-349

# In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN A. CHILA, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the government complied with the procedures set forth in Section 6203 of the Internal Revenue Code in assessing the tax against petitioner.

2. Whether petitioner's failure to receive notice and demand for payment of assessed taxes precludes the government from instituting a civil action to collect the taxes due.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-14) is reported at 871 F.2d 1015. The opinion of the district court (Pet. App. 1-8) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 27, 1989. The petition for a writ of certiorari was filed on July 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. On August 11, 1980, the Internal Revenue Service assessed John A. Chila for $39,703 in federal withholding

and social security taxes owed by Professional Concrete Service, Inc., for the third and fourth quarters of 1979. The taxes were assessed pursuant to Section 6672 of the Internal Revenue Code,[1] which makes the persons responsible for paying over such "trust fund" taxes to the government personally liable for the amount of the taxes that they "willfully" fail to pay. Petitioner failed to pay the assessed amounts. Pet. App. 10.

2. The United States then brought this suit against petitioner in the United States District Court for the Middle District of Florida to reduce the outstanding federal tax assessment against him to judgment. See I.R.C. § 7401. The parties stipulated that petitioner was a "responsible officer" within the meaning of Section 6672. The parties also stipulated that the IRS had furnished petitioner with three documents pertaining to the record of the assessment—a "Certificate of Assessments and Payments," a "Form 23 C" Assessment Certificate, and a "Form TY 53" account card. Petitioner defended against the government's suit by asserting that the assessment made against him was invalid on the ground that the documents he received did not satisfy the statutory requirement that he be furnished "a copy of the record of the assessment" (see I.R.C. § 6203). He also contended that the suit should be dismissed because he did not receive notice of the assessment and a demand for payment, as required by Section 6303 of the Code. Pet. App. 10-11.

The district court granted the government's motion for summary judgment (Pet. App. 1-8). The court ruled that the documents supplied to petitioner by the government satisfied all statutory and regulatory requirements (*id.* at 3-5). The court also ruled that a failure to provide notice

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

of assessment does not preclude a civil action to reduce the assessment to judgment (*id.* at 5-8); rather, the notice provision is designed only to provide "fair warning to taxpayers prior to summary collection procedures" (*id.* at 7).

3. The court of appeals affirmed (Pet. App. 9-14). The court concluded that "[t]here can be no question but that the documents presented by the United States in support of its assessment clearly met the requirement of the statute * * * [and] provided all the information called for in the statute, i.e., identification of the taxpayer, the character of the liability assessed, the taxable period and the date and amount of the assessment" (*id.* at 11). The court further stated that the "Certificate of Assessments and Payments" furnished by the government is "presumptive proof of a valid assessment" and that petitioner had submitted no evidence to rebut that presumption (*id.* at 12).

The court of appeals also rejected, on two independent grounds, petitioner's contention that the suit was barred by petitioner's failure to receive notice of the assessment. First, the court of appeals agreed with the district court that such notice is a prerequisite only to a summary enforcement procedure, not to a collection suit (Pet. App. 12-14). Second, the court held that, in any event, there was no basis for concluding that the notice required by Section 6303 had not been sent. The court explained that the Certificate of Assessment and Payments certified that notice had been sent, and petitioner had not denied that the notice was sent, but rather had claimed only that he did not receive it. Thus, the court concluded that, even if the IRS is required by Section 6303 to send the taxpayer a notice of assessment before commencing a collection suit, that requirement was satisfied here. Pet. App. 14.

## ARGUMENT

1. Section 6203 of the Code provides that an "assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules or regulations prescribed by the Secretary." It proceeds to state that, "[u]pon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment." This provision is elaborated upon in Treas. Reg. § 301.6203-1, which states that the "assessment shall be made by an assessment officer signing the summary record of assessment * * * [which], through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment." The regulation further requires the Commissioner to furnish the taxpayer, upon request, with "a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed." The courts below correctly found that the certificate of assessments and payments and the supporting documents furnished to petitioner provided all of the information described in the regulation and fully satisfied the requirements of the statute and the regulation. See *United States* v. *Dixon*, 672 F. Supp. 503, 506 (M.D. Ala. 1987), aff'd, 849 F.2d 1478 (11th Cir. 1988) (Table); see also *Brafman* v. *United States*, 384 F.2d 863, 867 (5th Cir. 1967); *United States* v. *Miller*, 318 F.2d 637, 639 (7th Cir. 1963). Accordingly, there was no violation of Section 6203 here and no basis for questioning the validity of the assessment.[2]

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[2] The cases relied upon by petitioner (Pet. 6, 13) are inapposite. In *Brafman* v. *United States*, *supra*, the presumptive correctness of the assessment was rebutted because the certificate of assessment was shown to be unsigned. There was no suggestion that a properly signed cer-

2. Section 6303 of the Code requires the Secretary, "as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, [to] give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." The court of appeals correctly rejected petitioner's contention that the government's collection suit here should be dismissed for failure to comply with this notice provision.

a. First, as a factual matter, the court correctly held (Pet. App. 14) that petitioner did not prove a violation of this notice provision. Although petitioner asserted that he did not *receive* notice, the court noted that petitioner "did not deny on the record that the notice was sent" (*ibid.*). The certificate of assessments in the record certified that notice of assessment had been sent to petitioner on August 11, 1980, and petitioner has provided no evidence to rebut that certification. The statute requires the government to *send* a notice of assessment to the taxpayer, but it does not place any duty on the government to ensure *receipt*. See *Thomas* v. *United States*, 755 F.2d 728, 730 (9th Cir. 1985). Thus, the court of appeals correctly held that the notice provisions of Section 6303 were not violated here, and petitioner's contention must fail regardless of the legal effect that such

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tificate, as here, would not satisfy the requirements of Section 6203. The other court of appeals cases cited by petitioner—*Coleman* v. *United States*, 704 F.2d 326 (6th Cir. 1983), *Weimerskirch* v. *Commissioner*, 596 F.2d 358 (9th Cir. 1979), and *Carson* v. *United States*, 560 F.2d 693 (5th Cir. 1977)—do not concern Section 6203 or the procedural validity of an assessment at all. Rather, they are cases where the court held that the assessments were *substantively* deficient because they lacked any evidentiary foundation; hence, the courts held that the assessments were arbitrary and not entitled to the presumption of correctness. Here, by contrast, there is no dispute about the substance of the assessments; petitioner stipulated that he was a "responsible person," and he has not challenged the amount of the assessed tax liability (see Pet. App. 10).

a violation would have on the government's ability to maintain a collection suit.

b. In any event, there is no merit to petitioner's legal contention that failure to provide notice under Section 6303 would prevent the government from maintaining a collection suit to recover the assessed taxes. The courts have repeatedly rejected this contention, holding that this notice is a prerequisite only to *administrative* collection of the tax liability; because a suit to collect taxes itself gives the taxpayer full notice and opportunity to be heard on the government's claim, there is no reason why a failure to provide Section 6303 notice should bar the tax claim. See *United States* v. *Berman*, 825 F.2d 1053, 1060 (6th Cir. 1987); *United States* v. *Erie Forge Co.*, 191 F.2d 627, 631 (3d Cir.), cert. denied, 343 U.S. 930 (1951) (under the 1939 Code); *Jenkins* v. *Smith*, 99 F.2d 827, 828 (2d Cir. 1938) (same).[3] Since it is well established that the government has a right at common law to sue on a debt (see, *e.g.*, *United States* v. *Chamberlin*, 219 U.S. 250, 261-262 (1911); *Dollar Savings Bank* v. *United States*, 86 U.S. (19 Wall.) 227, 239-240 (1874)), the assessment itself is not necessary to support this collection action. It follows a fortiori that notice of an assessment is not a prerequisite to suit.

Petitioner's reliance (Pet. 9-10) on the one case that has deviated from this line of authority is misplaced because that decision is no longer a viable precedent. In *United States* v. *Associates Commercial Corp.*, 721 F.2d 1094 (7th Cir. 1983), the court considered the question whether the govern-

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[3] See also *Security Industrial Ins. Co.* v. *United States*, 830 F.2d 581, 587 (5th Cir. 1987) (dictum); *United States* v. *Hunter Engineers & Constructors, Inc.*, 789 F.2d 1436, 1439-1440 (9th Cir. 1986), cert. denied, 479 U.S. 1063 (1987); *Jersey Shore State Bank* v. *United States*, 781 F.2d 974, 980-981 (3d Cir. 1986), aff'd, 479 U.S. 442 (1987); *Marvel* v. *United States*, 719 F.2d 1507, 1513-1514 (10th Cir. 1983); *Brafman* v. *United States*, 384 F.2d at 865 n.4.

ment's failure to give Section 6303 notice to a third-party lender barred a civil suit to collect a liability asserted against the lender under Section 3505 of the Code. The Seventh Circuit held that the government was required to give such notice and that its failure to do so barred the suit. The Seventh Circuit's holding in *Associates Commercial* was overruled by this Court in *Jersey Shore State Bank* v. *United States*, 479 U.S. 442 (1987), which held that there is no requirement that Section 6303 notice be given to a third-party lender who may be liable under Section 3505. While this Court therefore did not have to reach the issue whether a violation of Section 6303 would bar the United States from instituting a collection suit, its decision substantially undermines the portion of *Associates Commercial* discussing that point. The premise at the heart of both portions of *Associates Commercial* was that Section 6303 imposes an absolute notice requirement whose scope is unaffected by the purpose of the requirement—in particular, by the difference in collection procedures applicable to responsible officer liability and third-party lender liability. See 721 F.2d at 1098, 1100. That premise was emphatically rejected by this Court, which noted that the purpose of the notice requirement was closely tied to the possibility of summary administrative collection measures. See 479 U.S. at 447-448. Thus, the reasoning underlying the portion of *Associates Commercial* relied upon by petitioner has been repudiated, and it is apparent that the decision retains little vitality after this Court's decision in *Jersey Shore*. See *United States* v. *Berman*, 825 F.2d at 1060 n.6. There is consequently no live conflict between the Seventh Circuit and the other decisions cited above that warrants the attention of this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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